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OCTOBER TERM, 1980

NO. _____

In the Supreme Court of the United States

Jimmy L. Rogers, et ux

Petitioner

VS.

Sarrett Builders and Realty, Inc.

Respondent

PETITION FOR WRIT OF CERTIORARI TO

The Supreme Court of Mississippi

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QUESTIONS PRESENTED

The question presented in this petition is:

1. Whether the ruling of the Circuit Court of Madison County, Mississippi violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

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In the Supreme Court of the United States

APRIL TERM, 1981

NO. _____

Jimmy L. Rogers, et ux

Petitioner

VS.

Sarrett Builders and Realty, Inc.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner, **Jimmy L. Rogers,** et ux, prays that a writ of certiorari issued to review the judgment of the Supreme Court of Mississippi, which judgment was handed down, December 17, 1980 and no petition for rehearing was filed because no opinion was issued.

OPINIONS BELOW

No opinion of the Supreme Court of Mississippi is reported because none was filed.

The judgment of the Circuit Court of Madison County, Mississippi is shown in the Appendix at pages A1 through A2.

JURISDICTION

The Judgment and Affirmation of the Supreme Court of Mississippi was rendered December 7, 1980 and appears in the Appendix of this brief at page A3.

The petition for Certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

The parties hereto are Jimmy L. Rogers and Margaret A. Rogers, the defendants below and the Petitioners herein; and Sarrett Builders and Realty, Inc., hereinafter referred to as "Sarrett", the plaintiff below and the respondent herein.

Sarrett instituted this suit by filing a Petition to Enforce Lien in the Circuit Court of Madison County, Mississippi, on April 14, 1978, alleging that a valid notice of lien in the amount of $11,345.70 was filed of record in the office of the Chancery Clerk of Madison County, Mississippi. The petition further alleges that work and materials in the amount of $24,845.70 were furnished at the request of the Rogers, pursuant to an oral contract between the Rogers and Sarrett, and that a balance of $11,345.70 was due and that the Rogers failed and refused to pay.

On May 31, 1978, the Answer of the Defendant was filed, denying that the terms of the contract were complied with and alleging that the work had not been accepted. A County Claim was also filed, alleging Breach of Contract, alleging a failure to properly supervise the construction and a failure to construct the addition in a workmanlike manner. An unsworn estimate of the cost of materials and labor to repair the deficiencies and an estimate of the devaluation of the property was exhibited to the Counter Claim and the amount of the damages claimed was $45,000.00

On June 26, 1978, plaintiff filed his Reply to Affirmative Matter and Answer to Counter Claim.

On June 27, 1978, plaintiff propounded interrogatories to the defendant and the defendants' Answers were filed on July 31, 1978.

On December 6, 1978, the case was set for trial and the plaintiff failed to appear and Judgment was entered dismissing, without prejudice, the Petition to Enforce Lien in favor of the Counter Claimants in the amount of $9,000.00.

On December 19, 1978, Plaintiff filed a Motion to Set Aside Judgment which was sustained by the Court on March 14, 1979.

A Motion to Reinstate Declaration was filed on March 14, 1979, which was sustained.

On November 12, 1979, plaintiff filed a Motion Requesting Entry Upon Land for inspection and other purposes which was sustained on December 5, 1979.

The case was tried before a jury in the Circuit Court of Madison County, Mississippi. After close of all the evidence,

Rogers made a motion for a Directed Verdict based upon the failure of Sarrett to prove that a valid lien existed and the Court sustained the Motion but, let the case go to the jury on the theory of open account over the objection of Rogers. The jury returned a verdict in favor of the plaintiff and fixed the damages at the sum of $11,345.70 on the theory of open account and the jury found in favor of the plaintiff on the County Claim and awarded no damages to the defendant.

Final judgment was entered on said verdict; the defendant filed a Motion For A New Trial, which was overruled on January 24, 1980. An appeal was perfected from the final judgment and said order to the Mississippi Supreme Court which affirmed the case without opinion and entered judgment on December 17, 1980. A copy of the Judgment is attached.

REASONS FOR GRANTING THE WRIT

The judgment of the Supreme Court of Mississippi directly conflicts with the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The Court erred in failing to grant defendant's pre-emptory instruction and submitting the case to the jury on the theory of open account which we submit is in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The theory of recovery chosen by the respondent to pursue and as set out in the Declaration was to enforce a lien. At the close of both the Petitioners' and Respondent's case there had been no evidence before the Court that a lien existed or was filed of record, and upon motion of the defendant to directed verdict said claim was dismissed.

The Court, however, allowed the case to be submitted to the jury upon the theory of open account. We respectfully submit that this was error.

Section 13-1-141 Mississippi Code of 1972, Annotated provides:

> A person desiring to institute suit upon an open account in his favor, may make affidavit to the correctness such account, and that it is due from the party against whom it is charged. In any suit thereon such affidavit attached to the account shall entitle the plaintiff to judment at the trial term of the suit, unless the defendant make affidavit and file with his plea that the account is not correct, particularizing wherein it is not correct, in which event the affidavit to the account shall entitle the plaintiff the judgment only for such part of the account as the defendant by his affidavit shall not deny to be due. However this shall not apply to accounts against descedents and suits against executors and administrators. A defendant desiring to use an open account as a set-off shall be entitled to the benefit of this section.

Section 11-7-45 Mississippi Code of 1972, Annotated provides:

> There shall be annexed to or filed with the Declaration in every case founded upon open account, a copy of the account or bill of particulars of the demand . . . and evidence shall not be given on the trial unless so annexed or filed . . . . .

The accounts are itemized accounts which must show the dates of purchase, the kinds of goods, the quantity and the price. Fink and Co. v. Brewer, 133 Miss 9, 96So 402.

Note the Finck and Co. was decided prior to the enactment of Mississippi Code Annotated of 1972 but the two Sections cited above were unchanged as § 1754 and 1469 of Mississippi Code of 1942.

In an action on open account, it is not sufficient to file with the Declaration merely a statement of the amounts of invoices on bills rendered but there must be a copy of the account sued on, showing the items which compose it. Pipes v. Norton; 47 Miss 61, Philley v. Toler, 231 Miss 572, 95 So2d 783; Dickey v. Carothers and Carothers Construction Co., 230 So2d 813.

It is submitted that the Exhibit to the Declaration was insufficient as an itemized account for the reasons that it did not show the dates of purchase, the quantity of goods purchased, the kinds of goods purchased or the price, but was merely a list of invoice figures that the plaintiff added together.

We submit that since no proper itemized account was attached to the Declaration, the only issue before the Court was the issue involving a lien and it would manifestly unjust to allow the plaintiff to submit his case to the jury or a theory of recovery not properly set forth by the pleadings.

The petition to Enforce a Lien was a proceeding in Rem and the Petitioner fully expected and did defend his case based upon an in rem action. That is, he sought to defend on Breach of Contract and by a denial that the work was done in a workmanlike manner. After the action of the Circuit Court in allowing the case to go to the jury on the theory of open account, Petitioner was faced with the dilemma of arguing to the jury an entirely new and distinct course of action that

dealt with him in personam. This was not Due Process.

"The failure to comply with certain rules of pleading may constitute a denial of due process of law." U.S. - Yuen Boo Ming v. U.S. 103F2d 355.

The petitioner was entitled to notice that he was being sued on open account and not on a petition to enforce a lien. He had no notice actual or constructive until after the close of all evidence and was shut off from preparing or defending the case on open account.

"Due Process requires timely notice to one whose rights are affected in a civil proceeding." 16A CJS 797 citing a legion of cases.

It was a denial of Petitioners fundamental right to a due pocess hearing to allow the case to be submitted to the Jury on open account.

CONCLUSION

For these reasons, a writ of Certiorari should service to review the Judgment of the Supreme Court of Mississippi.

Respectfully submitted,

Jimmy L. Rogers, et ux
Jackson, Mississippi

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APPENDIX

IN THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

SARRET BUILDERS & REALTY, INC. **PLAINTIFF**

V. **NO. 1,875**

JIMMY L. ROGERS & MARGARET A. ROGERS **DEFENDANTS**

JUDGMENT

This cause came on for hearing on December 19, & 20, 1979, and the plaintiff, counter-defendant, and defendants, counter-claimants, being present in person and through counsel, and all parties having announced ready for trial, issue having been joined, it was ordered that the trial proceed; whereupon, there came a jury composed of Mary E. Malanchak and eleven other good and lawful citizens of Madison County, Mississippi, who were duly empaneled and sworn to try the issues joined, and the jury, having heard the evidence presented and received the instructions of the Court and having heard the argument of counsel, retired to consider their verdict and afterwards returned into open Court the following verdicts, to-wit:

> "We, the Jury, find for the plaintiff, Sarrett Builders & Realty, Inc., on its claim against Jimmy L Rogers and Margaret A. Rogers and assess its damages at $11,345.70."

> "We, the Jury, find for Sarrett Builders & Realty, Inc., on the Counter-claim of Jimmy L. Rogers & Margaret A. Rogers."

It is, therefore, ordered and adjudged that the plaintiff, Sarrett Builders & Realty, Inc., do have and recover of and from the defendants, Jimmy L. Rogers and Margaret A. Rogers, the sum of Eleven Thousand Three Hundred Forty Five and 70/100th Dollars ($11,345.70), plus interest at the rate provided by law from date of judgment until paid.

It is further ordered and adjudged that the defendants, Jimmy L. Rogers and Margaret A. Rogers, do have and recover nothing by their Counter-claim filed herein against the plaintiff, Sarrett Builders & Realty, Inc., and that said Counter Claim is finally dismissed with prejudice.

It is further ordered and adjudged that all costs incurred in this action be assessed against the defendants, Jimmy L. Rogers and Margaret A. Rogers, for which let execution issue.

So ordered and Adjudged on this the 21st day of December, 1979.

_____

CIRCUIT JUDGE

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,292

JIMMY L. ROGERS, ET UX

V.

SARRETT BUILDERS & REALTY, INC.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Madison County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court rendered in this cause on the 21st day of December, 1979-be and the same is hereby affirmed.

Judgment is in favor of Sarrett Builders and Realty, Inc. against Jimmy L. Rogers and Margaret A. Rogers and Insurance Company of North America, surety, in the amount of $11,345.70 plus interest at the rate of 8% per annum from December 21, 1979 until paid together with all costs taxed in the Lower Court and this Court adds the sum of $567.28 being damages at the rate of 5% as provided by statute. It is further ordered and adjudged that the appellant and Insurance Company of North America, surety on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.